APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: May 29, 2003]

02-50711

STATE OF TEXAS,
Plaintiff-Counter Defendants-Appellee,

versus

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; CARLOS HISA, Tribal Lieutenant Governor; FRANCISCO HERNANDEZ, Tribal Gaming Commissioner; ALBERT ALVIDREZ, Tribal Governor,
Defendants-Counter Claimants-Appellants,

Appeal from the United States District Court
for the Western District of Texas
(EP-99-CV-320-GTE)

Before WIENER and BARKSDALE, *Circuit Judges*, and FURGESON, *District Judge*[1].

PER CURIAM: [2]

Ysleta Del Sur Pueblo appeals the district court's refusal to modify its 27 September 2001 permanent injunction barring gambling activities on tribal lands. Ysleta Del Sur Pueblo contends the district court erred by not allowing it to

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[1] District Judge of the Western District of Texas, sitting by designation.

[2] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

participate in charitable bingo, carnival contests, and promotional player pool activities.

The denial of a modification to an injunction is reviewd for abuse of discretion. E.g., *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). In the light of the parties' oral arguments and briefs, pertinent parts of the record, and the insufficiency of the evidence regarding potential "qualified organization" sponsors of carnival contests, the district court did not abuse its discretion in refusing to modify the injunction.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: June 25, 2003]

No. 02-50711

STATE OF TEXAS,
Plaintiff-Counter Defendant-Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; CARLOS HISA, Tribal Lieutenant Governor; FRANCISCO HERNANDEZ, Tribal Gaming Commissioner; ALBERT ALVIDREZ, Tribal Governor,
Defendants-Counter Claimants-Appellants.

Appeal from the United States District Court for the Western District of Texas, El Paso

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 5/29/03, 5 Cir., _____, _____ F.3d _____)

Before WIENER AND BARKSDALE, *Circuit Judges*, and FURGESON, *District Judge*[1].

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En

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[1] District Judge of the Western District of Texas, Sitting by designation.

Banc, (Fed. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[/s/: Rhesa H. Barksdale]
United States Circuit Judge

REHG-4A

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

[Filed: May 17, 2003]

No. 3:99-CV-320-GTE

STATE OF TEXAS,

vs.

YSLETA DEL SUR PUEBLO, *et al.*

ORDER MODIFYING SEPTEMBER 27, 2011, INJUNCTION

Before the Court is the Defendants' Motion for Clarification of Order Granting Summary Judgment and Injunction. The State has responded, and the Defendants have submitted a reply brief. After reviewing the submissions, the Court is prepared to rule. The Defendants' requests will be granted in part and denied in part, and the Court's September 27, Injunction will be modified accordingly.

I. Factual and Procedural Background

The State of Texas filed this action against the Defendants on September 27, 1999, seeking to stop the operation of the Speaking Rock Casino and Entertainment Center (hereinafter "Casino") by the Ysleta Del Sur Pueblo Indian Tribe[1] (hereinafter "Tribe"). The Casino, located on the Tribe's reservation in El Paso County, Texas, opened in 1993 as a bingo hall, but subsequently expanded its gaming operations

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[1] The Ysleta Del Sur Pueblo Indian Tribe is also known as the Tigua Indian Tribe.

to include a wide variety of games of chance. The State sought to shut down the Casino as a nuisance in violation of the Texas Penal Code and the Restoration Act, 25 U.S.C. § 1300g.

The parties filed cross-motions for summary judgment. On September 27, 2001, the Court granted the State's motion and denied the Defendants' motion. The Court found that the Tribe "does not, as regards gambling, share a parallel sovereign status with the State of Texas," and shall be treated as any other private citizen or organization in regards to gaming questions. See 9/27/2001 Memorandum Opinion at 27. As such, the Court recognized that the Tribe is not prohibited from participating in all gaming activities, only those gaming activities that are prohibited to private citizens and organizations under Texas law. See 9/27/2001 Memorandum Opinion at 27-28. However, the Court noted that the Tribe had not attempted to qualify to participate in the permitted gaming activities:

> There are certain gaming activities that private citizens and/or certain organizations, such as charities, may engage in lawfully in Texas if they comply with those State rules, regulations, and licensing requirements that pertain to such gambling activities. The State has acknowledged that the Tribe, if it qualified under such rules and regulations and, if it complied with those established rules and regulations, could participate in such limited gaming activities. The problem here is that the Defendant Tribe has not even attempted to qualify under the rules, regulations or licensing requirements of the State of Texas with respect to any of the gaming activities presently being conducted at the casino on its Reservation. And, since the [California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)] criminal and prohibitory civil-regulatory distinction does not apply

under the Restoration Act with respect to gambling, the Tribe cannot engage in these "regulated" gaming activities unless it complies with the pertinent regulations.

9/27/2001 Memorandum Opinion at 28.

The Court concluded as a matter of law that the "Defendants' gaming activities on its reservation violate the Texas Penal Code and the Restoration Act." 9/27/2001 Memorandum Opinion at 37.[2] Finding the Casino to be a

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[2] The Court concluded as a matter of law:

7. The evidence in this case has established, and the Court so finds, that the Defendants in this case have embarked upon a long continued habitual course of conduct clearly violative of the Gambling Laws of the State of Texas and that such parties, unless enjoined, will continue such habitual illegal activities at Speaking Rock Casino. More specifically, such Defendants, YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, and GAMING COMMISSIONER FRANSICO HERNANDEZ have habitually used, and threatened or contemplated the continued habitual use of a place located in El Paso County, Texas, known as, referred to and advertised as the Speaking Rock Casino, which is geographically a part of the Ysleta del Sur Pueblo Indian land and which has a street address of 122 S. Old Pueblo Rd., El Paso, Texas 79907 for the purpose of illegal gambling, gambling promotion and communicating gambling information prohibited by law by providing a place where Defendants charge and collect monetary fees from the public resulting in an economic benefit to them based upon patrons, guests and customers playing gambling games and betting money on games played with cards, dice and other gambling devices in violation of § 47 of the Texas Constitution; Chapter 47 of the Texas Penal Code; § 125.002 and § 125.021 of the Texas Civil Practice and Remedies Code; and 25 U.S.C. § 1300g-1 et seq.
8. The operation of all games played with dice, cards, wheels, slot machines, KENO boards, off track betting and BINGO cards at Speaking Rock Casino are violations of Texas Penal Code

common and public nuisance under Texas law, the Court enjoined the Defendants from operating the Casino, having the practical and legal effect of prohibiting illegal as well as legal gaming activities by the Defendants. See 9/27/2001 Order Granting Summary Judgment and Injunction. Because the scope of said injunction is presently at issue, the Court quotes its relevant terms:

> INJUNCTION
>
> It is the Order of the Court, by this Injunction, that all such acts, activities, and conduct set forth above and also set forth below shall permanently CEASE, DESIST, and TERMINATE according to the time-table specified below.
>
> PERSONS AND PARTIES SUBJECT OF INJUNCTION
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> The Persons and Parties enjoined are as follows:
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> 1. Ysleta del Sur Pueblo
> 2. Tigua Gaming Agency
> 3. The Tribal Council of the Ysleta del Sur Pueblo
> 4. Tribal Governor Albert Alvidrez
> 5. Tribal Lieutenant Governor Filbert Candelaria
> 6. Gaming Commissioner Francisco Hernandez
> 7. The officers, agents, servants, employees, and attorneys of the foregoing persons and parties.

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§ 47.02 and constitute both a common and public nuisance under Texas Civil Practice and Remedies Code § 125.001 Common Nuisance and § 125.021 Public Nuisance.

9/27/2001 Memorandum Opinion at 37.38.

ACTIVITIES ENJOINED

The persons and parties enjoined and listed as being subject of injunction are hereby ORDERED to CEASE, DESIST, TERMINATE AND REFRAIN FROM engaging in, permitting, promoting, and conducting activities at the Speaking Rock Casino in violation of Chapter 47 of the Texas Penal Code, and 25 U.S.C. § 1300g of the Restoration Act, including but not limited to the following activities

A. Gambling activities played with cards, dice, balls, or any other gambling device where some, any or all of the persons and parties enjoined receive an economic benefit. Specifically prohibited are: all card games; all dice games; all games using one or more balls and or a spinning wheel; and games involving a vertical spinning wheel, which require players to pay a monetary fee, whether such fee is designated an "Ante," "Rake," Service Charge or otherwise.

B. Gambling activities played with cards, dice, balls, or any other gambling device where any or all of the persons and parties enjoined charge or collect or attempt to collect any monetary fee as a requirement for any person to bet on or play any game played with cards, dice, ball or any other gambling device, whether such fee is designated by "Ante," "Rake," Service Charge or otherwise.

C. Gambling activities played with cards, dice, balls, Keno tickets, bingo cards, slot machines, or any other gambling device where some, any or all of the persons and parties enjoined act directly or indirectly as the "house" or "banker" in the same fashion as the operator of the gambling casino.

D. Providing to any person for his/her use a slot machine, the operation of which results in or is calculated to result in an economic benefit to the owner or lessor of the slot machine.

E. Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to:

1. Bingo or any variation thereof;
2. Scratch tickets, peel tickets, or pull tabs;
3. Keno or any variation thereof;
4. Tigua Dice, Craps, or any variations thereof;
5. Slot Machines;
6. Poker card games;
7. Betting on horse races or dog races;
8. Tigua 21, Blackjack, or any variations thereof;
9. Wheel of Fortune, Big Six Wheel, or any variations of wheel games.

F. Allowing other persons or entities to engage in any of the above activities on the premises of the Speaking Rock Casino or anywhere upon the reservation lands of the Ysleta del Sur Pueblo or upon any other lands of said Tribe.

TIME FOR COMPLETE COMPLIANCE

For the reasons set forth in its Memorandum Opinion of even date herewith, the Court gives the Defendants until November 30, 2001, within which to bring themselves into full and complete compliance with the Injunction set forth herein.

9/27/2001 Order Granting Summary Judgment and Injunction at 2-5.

On October 12, 2001, the Defendants filed a motion for reconsideration of the Court's grant of summary judgment.[3] The Defendants also asserted that the injunction is overly broad, in that it prohibits legal as well as illegal gambling activity on the reservation. On November 2, 2001, the Court denied the motion for reconsideration, concluding that the Defendants had presented nothing more than "a rehash of old arguments." In response to the broadness question, the Court recognized that the Tribe would eventually, if it qualified, "be permitted to engage in those gaming activities that any other citizen of Texas could lawfully engage in." 11/2/2001 Order at 3. However, as the deadline for compliance with the injunction had not passed, and the Defendants were not yet in compliance, the Court opted not to modify the injunction, even to allow legal activities, until the illegal gaming activities ceased. The Court provided that once in compliance, the Defendants could petition for a modification of the injunction that would permit participation in legal gaming activities. Specifically, the Court stated:

> The Court believes it is unnecessary, and, indeed, that it would be unwise, to change the injunction in anticipation of possible future actions by the defendants to engage in legal gambling on the Tribe's reservation. The Court has enjoined the defendants' operations as a common and public nuisance under Texas law for violating the Restoration Act. After the illegal operations cease and the nuisance is fully abated, the defendants are, of course, free to petition the Court for a modification of any of the terms of the injunction that they believe might limit their ability to participate in any legal gaming activity for which they have qualified under Texas law. As of the date of the injunction, and as

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[3] The Defendants actually filed a Motion for New Trial and Motion to Amend Judgment. Because there had been no trial the motion was treated as a motion for reconsideration.

> of this date, the defendants have not, so far as the record reveals, taken any of the steps necessary to qualify.

11/2/2001 Order at 3-4.

The Defendants timely appealed the grant of summary judgment to the United States Court of Appeals for the Fifth Circuit. Pending the appeal, the Fifth Circuit granted the Defendants' motion to stay the injunction, and the Tribe continued operation of the Casino. On January 17, 2002, the Fifth Circuit affirmed this Court's decision. On February 12, 2002, this Court having received the Fifth Circuit's mandate, the Defendants complied with the injunction, ceasing operation of the Casino.

II. Discussion

On March 1, 2002, the Defendants filed the instant motion. Styled as a motion for reconsideration, the Defendants seek a declaration that various proposed activities do not violate this Court's injunction. Furthermore, to the extent the injunction limits the Tribe's ability to participate in legal gaming activities for which they qualify under Texas law, the Defendants seek a modification of the injunction.

The State generally contends that the Defendants' motion should be denied as moot because, it argues, the injunction only enjoined illegal gaming activities by the Tribe, and not legal activities. Thus, the Tribe is not prevented from otherwise participating in legal gaming activities. The Court disagrees with the State's position. As noted, the legal and practical effect of the Court's injunction was to cease all gaming activities by the Defendants. Though the Court recognized that the Tribe would ultimately be permitted to participate in legal gaming activities under Texas law, if it so qualified, the Court determined that to ensure the illegal gaming activities ceased, all gaming activities should be enjoined on the reservation. Once in compliance, the Court provided that the Defendants could petition the Court for a

modification of the injunction that would permit the Tribe to conduct legal gaming operations if it otherwise qualified under Texas law.

Therefore, the Court will consider the Defendants' request for declarations that various proposed activities do not violate the injunction, or, if an activity does violate the injunction and is a legal activity the Tribe is otherwise qualified to participate in under Texas law, that the injunction be modified to permit said activity. The Defendants seek a review of the following proposed activities: (1) conducting state lottery activities as an agent of the State; (2) amusement devices; (3) carnival contests; (4) sweepstakes; (5) charitable bingo; (6) player pool activities; and (7) card games.

A. State Lottery

* * * * *

B. Amusement Devices

* * * * *

C. Carnival Contests

The Defendants propose to participate in "carnival contests conducted at carnivals sponsored by qualified organizations, either as agent of the sponsor or as proprietor of the contest, as set forth in Section 47.01(1)(C) of the Texas Penal Code." Section 47.01 (1)(C) provides:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include: (C) an offer of merchandise, with a value not greater than $25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any non-profit agricultural or civic group incorporated by the

> state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

Tex. Penal Code Ann. § 47.01(1)(C). The Defendants note that the Tribe enacted a tribal ordinance including the above-quoted language. See Tribal Ordinance 003 (undated) at 2.03.

The State objects to this proposal, contending that the Tribe cannot be categorized as one of groups permitted to participate in carnival activities. The Court agrees with the State. The Tribe is not a religious, school, law enforcement, youth. agricultural, or civic group. Furthermore, the record evidences no indication that the Tribe has taken steps to become a non-profit entity under Texas state law, see generally Tex. Civ. Stat. Art. 1396-1.01 et seq., or otherwise qualifies as a fraternal group.

D. Sweepstakes

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E. Charitable Bingo

The Defendants propose that the Tribe be permitted to conduct charitable bingo activities, and the Tribe has adopted an ordinance the Defendants contend track the provisions of Chapter 2001. See Tribal Charitable Bingo Ordinance 002-02 (March 1, 2002).

Chapter 2001 provides, in part, that the Texas Lottery Commission (hereinafter "Commission") shall administer the provisions of Chapter 2001. See Tex.. Occ. Code Ann. § 2001.051(a). In order to participate in charitable bingo activities in Texas, an entity must apply for and receive a license from the Commission. See Tex.. Occ. Code Ann. § 2001.101 et seq.

The Tribe has not applied for a license, and contends that they may conduct charitable bingo activities in Texas without such a license, provided this Court so modifies the injunction. The Defendants rely on Section 107(b) of the Restoration Act, codified at 25 U.S.C. § 1300g-6(b), to contend that the Tribe is not subject to the regulatory jurisdiction of the State of Texas. Because the Tribe is not subject to the regulatory jurisdiction of Texas, they need not seek a license from the Commission or adhere to the other administrative provisions of state law to participate in charitable bingo activities.

The Court notes that while the Restoration Act provides that the Tribe is subject to Texas gaming law, the Act does not provide Texas any regulatory jurisdiction over the Tribe:

> (a) All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservations and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.-C.-02-86 which was approved and certified on March 12, 1986.
>
> (b) *Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.*

25 U.S.C. § 1300g-6(a)-(b) (emphasis added).

The State objects to the Tribe's charitable bingo proposal, contending that the Tribal ordinance does not fully track Chapter 2001. For instance, the ordinance provides: the Tribe holds the exclusive authority to operate and regulate charitable bingo activities on the Tribe; the Tribe, not the Commission, will act as the governing, auditing, and taxing

agency for charitable bingo activities; and "charitable purpose" is defined in relation to benefits for the Tribe. The State further asserts:

> The decision of this Court and the 1994 and 2002 decisions of the Fifth Circuit made clear that under the Restoration Act, Texas law defines the legality of any gambling activities by the tribe. The tribe is proposing that it operate bingo not according to Texas law, but according to its own ordinance. That suggestion flies in the face of decisional law that, by way of the Restoration Act's adoption of Texas law as surrogate federal law, the legality of any gambling activities are defined by Texas law.

The Court notes that the Tribe waived any parallel sovereign status, as regards gaming questions, that it might have when it made its compact with Texas in order to obtain federal trust status. The Tribe is bound, through the terms of the Restoration Act, to adhere to Texas gaming law. Not all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations. As such, the Tribe may participate in legal gaming activities. However, because of the scope and nature of the Tribe's violation of the Texas Penal Code, the Court's September 27, 2001, injunction enjoined all gaming activities on the Tribe, whether legal or illegal, the Court provided that once the Tribe complied with the terms of the injunction and ceased their gaming operations, it could petition the Court for a modification of the injunction to permit it to participate in legal gaming activities, provided that the Tribe otherwise qualified to participate is said activities. The Court further recognizes that Section 107(b) of the Restoration Act provides that Texas does not hold regulatory jurisdiction over the Tribe.

Though a close question, the Court concludes that, pursuant to its September 27, 2001, Memorandum Opinion, the

Defendants have not shown that the Tribe is "otherwise qualified" to participate in charitable bingo activities under Texas law. While the Tribe is not subject to the regulatory jurisdiction of the State, including the Commission, it is clear that the Tribe is subject to Texas law on all gaming matters, including participation in charitable bingo activities. To make the otherwise qualified showing, and to ensure that its charitable bingo proposal is not in violation of the Texas Penal Code, the Court concludes that the Tribe should be required to procure a license from the Commission. Only upon making this otherwise qualified showing, and proper motion to this Court, will the Court consider modifying the injunction to permit charitable bingo activities by the Tribe.

The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the Commission. It is not. Upon the Tribe's otherwise qualified showing, and modification of the injunction, the Tribe's charitable bingo activities would not be subject to the Commission's regulatory scheme. Nevertheless, the Tribe would still be bound by the Restoration Act to adhere to the Texas Penal Code and other relevant law in regards to gaming issues. If the Tribe's charitable bingo activities ever violated relevant Texas law, the State would be free under the terms of the Restoration Act to seek appropriate relief in a federal forum.

F. Player Pool Activities and Card Games

* * * * *

III. CONCLUSION

IT IS THEREFORE ORDERED that the requests made in the Defendants' Motion for Clarification of Order Granting Summary Judgment and Injunction [footnote omitted] be, and are hereby, GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that the Court's September 27, 2001, Injunction be, and it is hereby, MODIFIED to

permit the Tribe to participate in the following activities as provided herein:

1. State lottery activities as an agent of the State of Texas;
2. Amusement devices, but only to the extent the Tribe adheres to all the provisions of Tex. Penal Code Ann. § 47.01(4) and other relevant Texas law; and
3. Third-party giveaway contests conducted by national vendors.

Dated this 14th day of May, 2002.

[/s/:Garrett Thomas Eisle]
UNITED STATES DISTRICT JUDGE

APPENDIX D

TITLE 25—INDIANS

CHAPTER 14—MISCELLANEOUS

SUBCHAPTER LXXVIII—YSLETA DEL SUR PUEBLO: RESTORATION OF FEDERAL SUPERVISION

* * * * *

Sec. 1300g-2. Restoration of Federal trust relationship; Federal services and assistance

(a) Federal trust relationship

The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended (25 U.S.C. 461 et seq.), and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

* * * * *

Sec. 1300g-4. Provisions relating to tribal reservation

* * * * *

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

* * * * *

Sec. 1300g-6. Gaming activities

(a) In general

All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

* * * * *